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"MORALS AND ETHICS AND LAW, OH MY!" – AN HISTORICAL PERSPECTIVE ON THE ABA MODEL RULES OF PROFESSIONAL CONDUCT

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ABSTRACT

This paper discusses the tensions between moral obligations, ethical rules and legal requirements contained within the American Bar Association Model Rules of Professional Conducts by reviewing the history and evolution of the Model Rules and the conflicting societal purposes served by the Rules regarding client protection, attorney regulation, jurisprudential philosophy and social justice. Equally important is a discussion of the parallel development of attorney discipline.

KEYWORDS

Law, Ethics, Morality, Professional Responsibility, Model Code, ABA Canons, Model Rules

NOTE

The views expressed herein are solely those of the author and not those of the American Bar Association or its House of Delegates unless otherwise stated. The author thanks Natalia Vera, Senior Research Paralegal and Christina Sanfelippo, law student, Loyola

University School of Law. This article is dedicated in memory of two friends and colleagues: ABA Associate Executive Director and Center for Professional Responsibility Director Jeanne P. Gray and ABA CPR Director of Programs and Policy Marcia Kladder.

INTRODUCTION

Dorothy and the Scarecrow and the Tin Man, about to enter the eerie, imposing forest, contemplate the possible presence of lions...and tigers...and bears. Their trepidation over the unknown threats does not deter them, but it makes them ever more attentive to their surroundings. And, when the Lion pounces into their path they are better prepared. Dorothy is even ready to confront and attack him when he starts to attack Toto. Her slap on his face reveals the Lion to be all façade...indeed, the Cowardly Lion. But, as we all know, after they complete their tasks as ordered by the Wizard of Oz and reveal the Wizard to be a fraud, they all discover what we have learned by watching their behavior on their journey—that their perceived inferiorities were really socially imposed. And the symbols of their achievements demonstrate their strengths...and core values.

Along our yellow brick road, we look to the conceptual relationship between legal ethics and social ethics and morality through Venn diagrams I have developed to visualize ethics. Thereafter a brief history of the American Bar Association's various standards of legal ethics show how the practice of law changes. However, the impact of Richard Nixon and Watergate serves as a focal point for a dramatic change in both model standards, but also enforcement of those standards jurisdiction by jurisdiction. We learn that the system of lawyer discipline is as important as the establishment of Rules of Professional Conduct. Without enforcement, core values dissolve as quickly as the Wicked Witch of the West doused with a bucket of water.

1. CONCEPT OF LEGAL ETHICS

What do we think of when we think of "legal ethics"? A wisenheimer will respond, "We think it's an oxymoron."

There is no uniformity in the characterization of "legal ethics". Some scholars ponder the relationship between professional responsibility and good morals: "Is it necessary to regulate two fields separately, as it is sometimes done in the US (having in mind codes like those of civility besides the codes of professional responsibility), or must both fields be covered by a united regulation?"¹

Professor Deborah L. Rhode has adapted Reinhold Niebuhr's comment on law and applied it to legal ethics being "a 'compromise between moral ideas and

¹ Vytautas Magnus University International Scientific Conference "Good Morals of a Lawyer: Theoretical and Practical Issues", Description // http://law.vdu.lt/index.php?option=com_content&view=article&id=315:good-morals-of-a-lawyer-theoretical-and-practical-issues&catid=40:m-naujienos&Itemid=70 (accessed June 26, 2013).

practical possibilities.' . . . A central challenge of legal practice is how to live a life of integrity in the tension between these competing demands."²

Some legal ethics philosophers have been involved in an ongoing debate about the entire structure of legal ethics. There is an argument being propounded that legal ethics should focus on "virtues," such that a lawyer's conduct should be guided by an agreed intrinsic value. For example, lawyers should be truthful. Truthfulness is a virtue because we place an intrinsic value on truth.³

This leads to the Rendleman Legal Ethics Venn Diagram from Hell illustrating the interrelationship where "legal ethics" fits with "morals", "law", "religion", and "social ethics".

Joseph Campbell, the extraordinary American scholar on comparative mythology, tells a story that exemplifies the elements of homogeneous culture and a diverse culture:

In American football, for example, the rules are very strict and complex. If you were to go to England, however, you would find that the rugby rules are not that strict. When I was a student back in the twenties, there were a couple of young men who constituted a marvelous forward-passing pair. They went to Oxford on scholarship and joined the rugby team and one day they introduced the forward pass. And the English player said, "Well, we have no rules for this, so please don't. We don't play that way."

Now, in a culture that has been homogeneous for some time there are a number of understood, unwritten rules by which people live. There is an ethos there, there is a mode, an understanding that, "we don't do it that way."⁴

This is the context in which one contemplates the origins of legal ethics. It is my hypothesis that, in a macro sense, society develops. Individuals create an individual sense of "right and wrong" or "morality". One can only presume that, simultaneously, the group developed a sense of society. Rather than a legislated rule book, a homogeneous group develops a consensus of "the way things are done." This sense of society ultimately becomes what Rousseau describes (appropriately, in my humble opinion) the move from the "state of nature" to the "civil state". It is in this "civil state" where laws are established—by the king, the church or some form of legislature. These steps are illustrated in the progressive steps of the Venn Diagram.

In my initial Venn Diagram, there is the overlap between "morality" and "social ethics".⁵

² Deborah L. Rhode, ed., *Ethics in Practice: Lawyers' Roles, Responsibilities and Regulation* (Oxford University Press, 2000), p. 3.

³ Andrew V. Ayers, *What if Legal Ethics Can't Be Reduced to a Maxim?*, 26 Geo. J. Legal Ethics 32 (winter 2013).

⁴ Joseph Campbell and Bill Moyers, *The Power of Myth* (Anchor Books, 1991), p. 10.

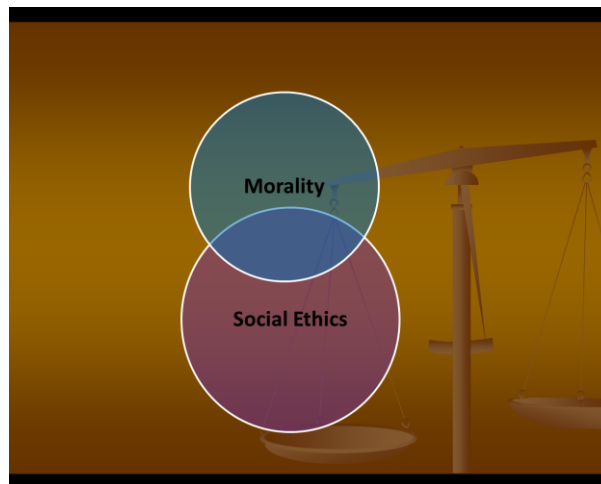


Fig. 1

Though chronologically it may be significant; for my hypothesis, time is irrelevant. Ultimately, religion emerged with its rules and dogma. The concepts of individual “morality” and “social ethics” were incorporated—or some might say “co-opted” into religion.

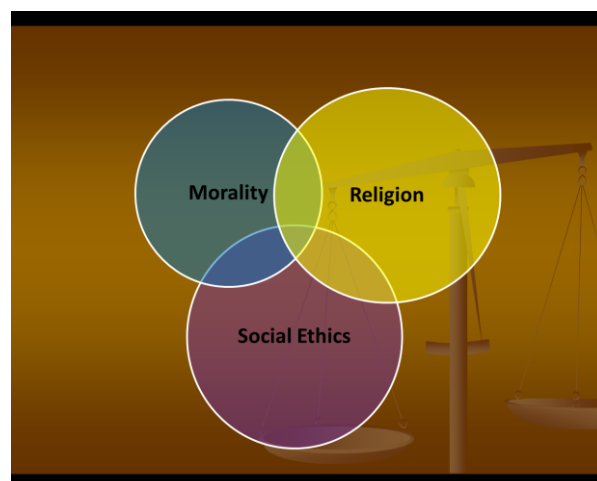


Fig. 2

To grossly overgeneralization, it was a small step from religion to enforcement of religious rules through establishment of law. Law served as a mechanism to help organize religion.

⁵ Jean Jacques Rousseau, *Social Contract* // http://www.constitution.org/jjr/socon_01.htm (accessed June 27, 2013).

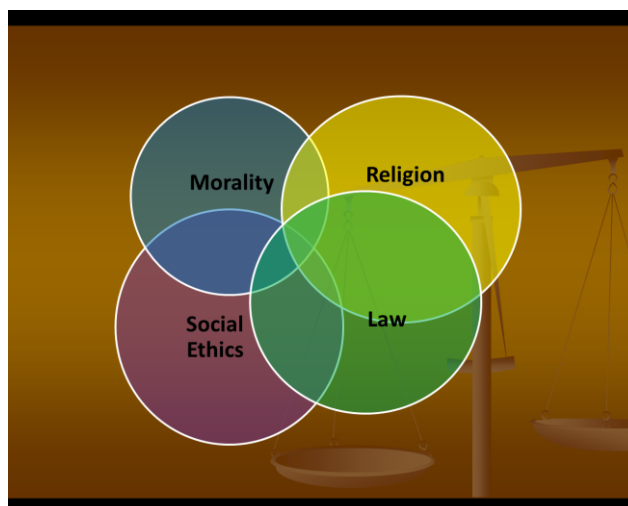


Fig. 3

From these four sources, the law of legal ethics has emerged. Legal ethics overlaps and incorporates elements from each of these areas. (As a side bar, I would note that I fluctuate on whether the “legal ethics” circle should be encompassed entirely within the law circle or whether some of it should be outside the law circle. While every aspect of a jurisdiction’s Rules of Professional Conduct are law in that, in most cases, they are adopted by the highest court of the jurisdiction, many aspects of the Rules are not strictly enforceable as disciplinary violations.)

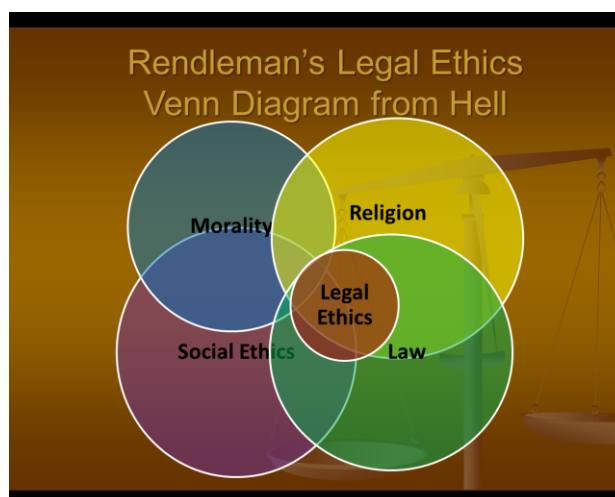


Fig. 4

This brings us to the formal codification of ethics in the legal profession. Professor Geoffrey C. Hazard, Jr., Reporter for the 1983 review of the Model Rules and a member of the “Ethics 2000” Commission, has stated that “*ethics* refers to imperatives regarding the welfare of others that are recognized as binding upon a

person's conduct in some more immediate and binding sense than *law* and in some more general and impersonal sense that *morals*." (italics in original).⁶

2. HISTORY OF ABA CANONS, MODEL CODE AND MODEL RULES

There have been three general "rubrics" of Ethics—all non-binding unless and until adopted by an entity with authority to regulate the practice of law:

- Canons of Professional Ethics—1908-1969
(Ultimately numbering 47 Canons);
- Model Code of Professional Responsibility—adopted 1969
(formatted into three levels of standards— General Canons, aspirational Ethical Considerations, and black letter Disciplinary Rules);
- Model Rules of Professional Conduct—adopted 1983
(black letter Rules in the "Restatement of Laws" format).

In 1905, President Theodore Roosevelt gave a speech at Harvard condemning lawyers for aiding their corporate clients in avoiding and evading new regulations that Roosevelt had successfully pushed through Congress. President Roosevelt's upbraiding prompted the American Bar Association to consider adoption of a code of professional ethics.⁷ However, this may be considered a revisionist perspective. According to Henry Drinker, the official historical voice on ABA ethics:

About 1875 the leaders of the bar, realizing the deplorable condition into which their profession was falling, as well as the imperative necessity of taking a firm stand against the rising tide of commercialism and the growing influence of those who would turn the profession from a "branch of the administration of justice" into a "mere money getting trade," began the movement for the reestablishment at the bar of standards of character, education, and training and also for the organization of bar associations all over the country.⁸

In 1908, the ABA adopted thirty-two Canons.⁹

Of course, the Canons of Ethics that evolved did not address the issues that President Roosevelt condemned. Rather, the corporate lawyers were in control of the process resulting in rules that focused on "ambulance chasers" and those serving middle and lower income populations.¹⁰ Or, as Drinker phrased it:

⁶ Geoffrey C. Hazard, Jr., *Ethics in the Practice of Law* (New Haven: Yale University Press, 1978), p. 1. The Hazard configuration is only slightly contradictory to Venn Diagram in that his use of the word "law" focuses on statutory law rather than my focus that ethics rules are "law" because they are generally adopted as rules of court.

⁷ Jerold S. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* (New York: Oxford University Press, 1976), p. 40.

⁸ Henry S. Drinker, *Legal Ethics*, 30 Indiana L.J. 20 (1953).

⁹ *Ibid.*, 24.

¹⁰ Jerold S. Auerbach, *supra* note 7, p. 41.

Unquestionably, the primary reason for the great activity in the bar associations in framing and adopting Codes of Ethics...was...the realization by thoughtful leaders of the bar of the growing commercialism all over the country. The consequent weakening of an effective professional public opinion clearly called for a more definite statement by the bar of the accepted rules of professional conduct.¹¹

Regardless of the spin, the end result was based upon Pennsylvania Justice and legal scholar George Sharswood's 1854 *Essay on Professional Ethics* and on the Alabama Code of Ethics adopted in 1887.¹²

The Canons, reflecting values appropriate to a small town, were easily adaptable to an equally homogeneous upper-class metropolitan constituency, where they served as a club against lawyers whose clients were excluded from that culture: especially the urban poor, new immigrants, and blue collar workers.¹³

These Canons ranged from specific rules to aspirational goals. For example, Canon 10: "The lawyer should not purchase any interest in the subject matter of the litigations which he is conducting."¹⁴ Compare that specific rule to Canon 21: "It is the duty of the lawyer not only to his client, but also to the Court and to the public to be punctual in attendance, and to be concise and direct in the trial and disposition of causes."¹⁵ By 1969 additional Canons had been added over the years bringing the total to 47 Canons.¹⁶

In 1969, the Canons were replaced with the 1970 ABA Model Code of Professional Responsibility. According to the preface, the previous Canons were distilled into four principals: "(1) there were important areas involving the conduct of lawyers that were either only partially covered in or totally omitted from the Canons; (2) many Canons that were sound in substance were in need of editorial revisions; (3) most of the Canons did not lend themselves to practical sanctions for violations; and (4) changed and changing conditions in our legal system and urbanized society required new statements of professional principles."¹⁷

A key component of the new Model Code was the change in structure. The Model Code created nine canons that were general statements of philosophy. Under these Canons were 18 Ethical Considerations, which stated aspirational principals, but which were not to be the basis for discipline of an attorney. And, thereafter,

¹¹ Henry S. Drinker, *supra* note 8: 24-25.

¹² *Ibid.*

¹³ Jerold S. Auerbach, *supra* note 7, p. 42.

¹⁴ American Bar Association, *Compendium of Professional Responsibility Rules and Standards* (American Bar Association, 2013), p. 426.

¹⁵ *Ibid.*, p. 429.

¹⁶ *Ibid.*, p. 436.

¹⁷ *Ibid.*, p. 223.

there were 41 Disciplinary Rules below which no lawyer's conduct should fall without the risk of discipline.¹⁸

As explained by chair of the ABA committee that developed the new rules:

The Canons contains an odd mixture of rules (i.e., law) and spacious generalizations or exhortations that were probably intended to aid understanding but did not state or analyze the roles of the lawyer or the reasons underlying professional standards. Confusion results when hortatory statements are intermixed with prohibitory rules, thus making it easier for lawyers to mistake such a code as a guide for action that accords with highest morality, while at the same time rendering it difficult for courts to enforce the document as a disciplinary code.¹⁹

Fewer than seven years later a new ABA commission began studying the Model Code. (See, Watergate, *infra.*) Six years later, in August 1983, the new ABA Model Rules of Professional Conduct were finally adopted.²⁰ There were a multitude of changes proposed—many accepted and several rejected. Most significantly, the entire format was revamped. No more canons, ethical considerations and disciplinary rules. Instead, the new Rules use what is called the "restatement format". In fact, the format consists of a rule on a direct topic followed by explanatory comments intended to guide interpretation, but not be a part of the rule or an independent basis for discipline. The Rules are collected in related subject areas by common number.²¹ The chair of the drafting commission stated: "The Model Rules of Professional Conduct are intended to serve as a national framework for implementation of standards of professional conduct."²²

But the Rules are only a part of the story.

3. THE WIZARDS OF WATERGATE

It is considered an article of faith that Watergate was a watershed event for the legal profession. It is not just coincidence that the ABA began a comprehensive review of the 1969 Model Code of Professional Responsibility in the summer of 1977.

Like the Wizard of Oz, the Wizards of Watergate turned out to be extremely disappointing. In fact, like Toto pulling back the curtain, it was John Dean, Richard

¹⁸ *Ibid.*, p. 220-322. American Bar Association, *ABA Model Code of Professional Responsibility* // <http://www.americanbar.org/content/dam/aba/migrated/cpr/mrpc/mcpr.authcheckdam.pdf> (accessed May 24, 2013).

¹⁹ Edward L. Wright, *The Code of Professional Responsibility: Its History and Objectives*, 24 Ark. L. Rev. 12-15 (1970). It is interesting to note that Wright spends only one paragraph discussing what could be called "lawyer advertising" while not even using the phrase.

²⁰ Ellen J. Bennett, Elizabeth J. Cohen, and Martin Whittaker, *Annotated Model Rules of Professional Conduct* (American Bar Association, 2011), p. xi-xiii.

²¹ American Bar Association, *Compendium*, supra note 14, p. 11.

²² *Ibid.*, p. 13.

Nixon's White House (in-house) counsel, who revealed that those behind the Watergate curtain were predominately lawyers. Dean identifies as a key moment in the Watergate saga this exchange from his testimony before the United States Senate Watergate Committee.

Herman Talmadge, a Democrat from Georgia, directed his attention to exhibit 34-47.

"It is a list of all the people that you thought had violated the law and what the laws may be that they violated—is that correct?" the Georgia senator inquired.

"That is correct," Dean responded. "My first reaction was: There certainly are an awful lot of lawyers involved here. So I put a little asterisk beside each lawyer."

"Any significance to the stars?" asked Talmadge, referring to the asterisks.

"That was just a reaction of mine," answered Dean. "How in God's name could so many lawyers get involved in something like this?"²³

As Dean later said:

In 1972, legal ethics boiled down to 'don't lie, don't cheat, don't steal and don't advertise' ...When I took the elective course in ethics at law school, it was one-quarter of a credit. Legal ethics and professionalism played almost no role in any lawyer's mind, including mine. Watergate changed that—for me and every other lawyer.²⁴

The Wizard of Oz attempts to excuse his fraud saying: "I'm really a very good man, but I'm a very bad wizard."²⁵ A similar excuse is not viable for those lawyers involved in President Nixon's Administration and re-election campaign.

4. "THE REST OF THE STORY"²⁶

The rest of the story of the evolution of legal ethics is the parallel development of the attorney discipline system. The concomitant story for the change in lawyer ethics and discipline is the environment in which these developments were occurring. While Watergate was a watershed event, it was only a part of a larger sea change.

In 1962 President John F. Kennedy made a special message to Congress on Protecting Consumer Interests calling for increased administrative and legislative

²³ Mark Curriden, "The Lawyers of Watergate: How a '3rd-Rate Burglary' Provoked New Standards for Lawyer Ethics," *ABA Journal* (2012).

²⁴ *Ibid.*

²⁵ L. Frank Baum, *The Wonderful Wizard of Oz*, Ch. 15, The Discovery of Oz the Terrible // <http://www.kancoll.org/books/baum/oz15.htm> (accessed December 12, 2013).

²⁶ This catch phrase was used by Chicago-based radio personality Paul Harvey, who created historical vignettes with surprise endings that told "the rest of the story" ("Paul Harvey Dead at 90," *Chicago Tribune* // <http://web.archive.org/web/20090305070224/http://www.chicagotribune.com/entertainment/chi-paul-harvey-dead,0,3381755.story> (accessed May 22, 2013)).

action to protect consumers. Seemingly taking a lead from President Franklin D. Roosevelt's "Four Freedoms,"²⁷ Kennedy called for consumers to have a Right to Safety, a Right to Information, a Right to Choose, and a Right to Be Heard.²⁸ In 1965, Ralph Nader published *Unsafe at Any Speed*, a condemnation of the automobile industry for ignoring safety and focusing on styling, comfort, speed, power, and a desire to cut costs.²⁹ Throughout the 1960's and 1970's Congress and the States adopted a variety of laws and regulations that moved the pendulum back toward protection of consumers and the public. The restructuring of the attorney discipline system was a part of that movement. In many ways, this was a reflection of President Theodore Roosevelt's earlier condemnation of the legal profession that resulted in the Canons, but not the change Roosevelt sought.

In her seminal article, "The Development of Lawyer Disciplinary Procedures in the United States," my former colleague Mary M. Devlin at the ABA Center for Professional Responsibility describes three eras of lawyer discipline. The First Era, from the earliest years of the colonies up to the mid- to late 19th and early 20th Centuries, is based in the Courts. The Second Era began with the formation of state and local bar associations. While judges had disciplined an attorney through the power of contempt of court and the ability to strike an attorney from the role of attorneys authorized to practice, bar associations established grievance committees consisting of volunteer attorneys. The attorneys would receive complaints from the public and other attorneys, conduct investigations, hear the charges and prosecute the cases before courts or other administrative bodies depending on the state's structure.³⁰

The Third Era corresponds with the development of the 1970 Model Code of Professional Responsibility and the consumer rights movement. In 1970, after three years of studying the disciplinary systems of lawyers throughout the United States, the ABA's Special Committee on Evaluation of Disciplinary Enforcement chaired by former U.S. Supreme Court Justice Tom Clark (and, therefore, known as the "Clark Committee") issued a report that condemned the state of lawyer discipline as ineffective and a disservice to the public and the legal system. Ms. Devlin concludes that the Committee's "most lasting legacy...is its consideration of the profession's failed attempt at self-policing through the use of volunteer lawyers' investigating

²⁷ The Four Freedoms were Freedom of Speech, Freedom of Religion, Freedom from Want, and Freedom from Fear (Franklin D. Roosevelt, "Message to Congress, 1941" // <http://www.fdrlibrary.marist.edu/pdfs/ffreadingcopy.pdf> (accessed May 25, 2013)).

²⁸ John F. Kennedy, "Special Message to the Congress on Protecting the Consumer Interest," The American Presidency Project // <http://www.presidency.ucsba.edu/ws/?pid=9108> (accessed May 15, 2013).

²⁹ "Ralph Nader and the Consumer Movement," Digital History // http://www.digitalhistory.uh.edu/disp_textbook.cfm?smtID=2&psid=3351 (accessed May 25, 2013).

³⁰ Mary M. Devlin, *The Development of Lawyer Disciplinary Procedures in the United States*, 7 Geo. J. Legal Eth. 911, 912-921 (spring 1994).

and prosecuting complaints....Dissatisfaction with the disciplinary procedures of the bar associations led the Clark Committee to call for the professionalization of lawyer disciplinary enforcement."³¹

And thus today, the U.S. has professionalized its attorney discipline system. All 50 states (and the District of Columbia) have state and/or county based lawyer disciplinary agencies.³²

5. WHAT ARE "LEGAL ETHICS" AND WHY ARE LAWYERS DISCIPLINED?

There is a gap between the topics covered in the Canons, the Code and the Rules and the conduct that results in the discipline of lawyers—like Rendleman's Venn Diagram from Hell, Part Two. While there is much overlap, there is also conduct that is covered by the Rules but rarely results in discipline. And it would seem that there always has been. The most egregious misconduct—particularly conduct that also violates criminal law—is the surest route to lawyer discipline.



Fig. 5

Here the ABA Model Rules is at the core, but there is both discipline and ethics that go beyond the text of the Model Rules. Indeed, lawyer discipline has long predated the existence of any rules of ethics.

According to Drinker, "In the old days a lawyer was 'disbarred' by literally being cast over the bar, which was a substantial barrier of iron or wood separating

³¹ *Ibid.*: 921-922.

³² For more information on individual disciplinary agencies see American Bar Association, "Directory of Lawyer Disciplinary Agencies" // http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/current_disciplinary_agency_directory_online.authcheckdam.pdf (accessed June 27, 2013).

the court and its official staff from litigants and others.”³³ There is no direct evidence of that practice being followed in reported cases in United States courts. Rather, as Devlin categorizes the process, during the First Era, it was just the Courts.

In 1821 attorney Joseph Holding was stricken from the roll of attorneys by the Constitutional Court of Appeals of South Carolina. He was convicted of an attempt to suborn perjury of a witness.³⁴

In 1829 the Tennessee Supreme Court noted the standard for disbarment: “That an attorney may be stricken from the roll for good cause, none can doubt.” Moreover, the Court addressed the authority of the court both historically, going back four centuries into English law, and philosophically.³⁵

[O]ur statutes require that the attorney shall be of good moral character, learned, and of capable mind. A loss of either of these, [sic] is good ground for withdrawing the privilege conferred by the license. Suppose an attorney were to become insane, by the hand of Providence, or by intemperance; he would be disqualified, and the license should be withdrawn; were he to become besotted and notoriously profligate, he would be neither virtuous nor of good fame, and should be stricken from the roll. An [sic] hundred instances might be cited, where attorneys, once qualified, might become disqualified, when the privilege should be taken from them.³⁶

With that as the background, it was not difficult for the Court to disbar an attorney who killed a man by participating in a duel: “Let it be once understood that the bar of Tennessee *dare* not fight, and it will be deemed cowardly to challenge a member of it; and this court solemnly warns every lawyer, that if he violates the laws made to suppress duelling [sic], we will strike him from the rolls of the court....”³⁷

Personal conduct that violates the criminal laws—regardless of whether there has been a conviction—can be sufficient to evidence a lack of fitness to continue in the practice of law.

In *Delano’s Case*, 1876, the Supreme Court of New Hampshire removed an attorney from practice for misappropriation of funds of another. However, it was not the money of a client. The attorney also served as collector of taxes for the town. The attorney and his wife were also engaged in a manufacturing business. He misappropriated the town’s tax money for the benefit of the manufacturing business expecting to restore the funds. Not surprisingly, he was unsuccessful in

³³ Henry S. Drinker, *supra* note 8: 34.

³⁴ *State v. Holding*, 1 McCord 379 (1821).

³⁵ *Smith v. State*, 9 Tenn. 228, 229 (1829).

³⁶ *Ibid.*: 230.

³⁷ *Ibid.*: 234.

restoring the missing funds. While the Court noted that the attorney and his wife and family did what they could to make good the loss, they were only partially successful.³⁸

It is no surprise an attorney is sanctioned for defalcation of money—client's or otherwise.

Moreover, a lawyer is a lawyer at all times when acting as a lawyer or seemingly in a "personal" capacity. *In re Wall*, the attorney was

... in an unlawful gathering, as it was resisting the protestations of the sheriff and mayor, although it may not have been tumultuous....I am too well aware of his influence in this community not to know that his presence would be ample encouragement to others on such an occasion. It is not alone by words that one advises and encourages, and the fact of his presence and action is sufficient not only to find an encouraging thereby, but raise a presumption on his doing the same by words.³⁹

The Court summed up its philosophy in words that would resonate with most courts and disciplinary authorities today: "For an officer of a court to bear about with him two characters, that of a supporter of the law, as a lawyer, and an open violator and contemner of it outside his professional duties, as a man, is utterly inconsistent with the dignity of his position, and of the court that bestows the same upon him."⁴⁰

The incident in question was a lynching. The fact that the attorney, J.B. Wall, was present and participated in the lynching that occurred at a tree directly in front of the court-house door to a prisoner who had been taken to the jail in front of the judge, brought a special concern to the matter.⁴¹ One might question whether the judge had a conflict of interest in the matter, but for our purposes, it does demonstrate how the line between professional and personal behavior can be indistinguishable.

The *Wall* case also illustrates the fuzzy line between the First Era court's use of its inherent power of contempt and the authority to discipline attorneys. The Colorado court said in 1884:

The purpose of proceedings for contempt and those for disbarment, and the powers and duties of courts in connection therewith, must not be confused. The former may be termed a police regulation or power, for the protection of the court from present direct interference and annoyance in a trial or proceeding taking place before it; the latter is intended to protect, generally, the administration of justice, to save the legal profession from degradation by

³⁸ *Delano's Case*, 58 N.H. 5 (1876).

³⁹ *In Re Wall*, 13 F. 814, 818 (S.D. Fla., 1882).

⁴⁰ *Ibid.*

⁴¹ *Ibid.*: 815.

unworthy membership, and to guard the interest of litigants against injury from those intrusted [sic] with their legal business....A contempt may constitute ground for disbarment, but it by no means follows that the cause for disbarment must, in all cases, constitute a contempt.⁴²

The Courts had no difficulty in regulating the conduct of attorneys prior to establishment of Canons, Code or Rules. With the Canons, Code or Rules, Courts had another resource upon which to base rulings relating to attorney conduct.

In 1908, even before the Canons had been formally adopted by the ABA, the Supreme Court of South Dakota quoted the Canons draft as being "[p]resumptively, the best thought of the profession, in this country, on the subject of the lawyer's duties...."⁴³ In ruling that the defendant's conviction for manslaughter should be reversed and a new trial ordered, the Court concluded that the misconduct by the prosecuting attorney was grounds for dismissal and quoted from the proposed Canons:

A lawyer should not offer evidence which he knows the court should reject, in order to get the same before the jury by argument for its admissibility, nor should he address to the judge arguments upon any point not properly calling for determination by him. Neither should he introduce into an argument, suitably addressed to the court, remarks or statements intended to influence the jury or bystanders. These and all kindred practices, appropriately termed 'pettifoggery,' are unprofessional and unworthy of an officer of the law charged, as is the lawyer, with the duty of aiding in the administration of justice.⁴⁴

During the Second Era, the establishment and evolution of state and local bar associations began to develop grievance committees that investigated complaints from the public and to both reprimand lawyer/members directly or taking more serious matters to the courts for action.⁴⁵ In 1953, Drinker summarizes the cases of lawyer discipline as involving two distinct characteristics:

1. Cases in which the lawyer's conduct has shown him to be one who cannot properly be trusted to advise and act for clients.
2. Cases in which his conduct has been such that, to permit him to remain a member of the profession and to appear in court, would cast a serious reflection on the dignity of the court and on the reputation of the profession.⁴⁶

What is perhaps the most fascinating aspect of the Second Era is the organized bar's obsession with advertising. Drinker's section on advertising issues is

⁴² Henry S. Drinker, *supra* note 8: 39 (quoting *People ex rel. Elliott v. Green*, 7 Colo. 237, 247-48 (1884)).

⁴³ *State v. Kaufmann*, 22 S.D. 433, 118 N.W. 337, 339 (1908).

⁴⁴ *Ibid.*

⁴⁵ Mary M. Devlin, *supra* note 30: 919.

⁴⁶ Henry S. Drinker, *supra* note 8: 42.

exceeded only by the section discussing the lawyer's obligation to his client—and it is a close second. Today, thirty-five years after the U.S. Supreme Court said that lawyer advertising was constitutionally protected commercial speech that could be regulated but not prohibited;⁴⁷ there are still states with draconian regulatory regimens.⁴⁸

6. WHY LAWYERS ARE DISCIPLINED

Surprisingly, there is no national database on what conduct results in the discipline of lawyers. Preliminary research on a project to develop a database on the relationship between specific rules and conduct and disciplinary action has revealed interesting connections between conduct and the Model Rules. First, we surveyed state disciplinary web pages for annual reports. We found the most reports for the year 2010 when there were 15 state reports.⁴⁹ These fifteen states represented approximately one-third of the attorney population in 2010. There is no consistency between how individual states report. Taking the reported conduct as given, we cross referenced the conduct reported with the appropriate Model Rule regardless of whether a specific rule was referenced in the report. These preliminary results are imperfect as we did not include cases involving multiple rule violation reports, nor did we investigate the details of each case to determine conduct where no specific rule could be identified. Therefore, these results, while better than anecdotal, are merely general indications. With these caveats, however, the most common cause for discipline was conduct falling under Model Rule 1.3, Diligence "A lawyer shall act with reasonable diligence and promptness in representing a client."⁵⁰ The second most common identified misconduct corresponds with Model Rule 1.4, Communication.⁵¹ The third most common basis

⁴⁷ *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

⁴⁸ Florida Bar, "Summary of New Lawyer Advertising Rules" // [http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/3E5714478D713B9585257B100056C04C/\\$FILE/Ad%20Rules%20Summary%202013.pdf?OpenElement](http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/3E5714478D713B9585257B100056C04C/$FILE/Ad%20Rules%20Summary%202013.pdf?OpenElement) (accessed July 2, 2013).

⁴⁹ State reports included Arkansas, Arizona, California, Delaware, Illinois, Maryland, Michigan, Minnesota, Missouri, Montana, New Hampshire, Oregon, Utah, Washington, Wisconsin.

⁵⁰ American Bar Association, *Model Rules of Professional Conduct* (American Bar Association, 2013).

⁵¹ Rule 1.4 *Communication* states that:

(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information; and
- (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law (*ibid.*, Rule 1.4).

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

for discipline is related to client funds, which corresponds with Model Rule 1.15.⁵² As we continue our research, we will discover how directly reference and reliance on the Rules appears in the actual disciplinary proceedings.

Those direct rule references are relevant because most every state also authorizes discipline based upon the same general standards identified in the early court cases cited from the First Era. For example, in Illinois, the Administrator of the Attorney Registration and Disciplinary Commission is authorized to investigate "attorneys...whose conduct tends to defeat the administration of justice or to bring the courts or the legal profession into disrepute...."⁵³

Further, conduct that isn't explicitly covered by the Rules may still result in discipline based upon the Rules. For example, *In re Rinella*, the Illinois Supreme Court suspended the attorney for engaging in sexual relations with three different clients and lying to the disciplinary commission about the incidents.⁵⁴ The attorney argued before the Court that he could not be sanctioned for having sex with clients because "no disciplinary rule specifically proscribes such conduct, and that imposing a sanction under these circumstances would violate due process because he did not have adequate notice that his conduct was prohibited."⁵⁵

In response, the Court states that "the standards of professional conduct enunciated by this court are not a manual designed to instruct attorneys what to do in every conceivable situation."⁵⁶ Moreover, the Court agreed with the disciplinary board that such conduct created a conflict of interest between the lawyer's personal interests and the client's interest and violated the client's confidentiality by the lawyer's use of protected client information for the lawyer's benefit.⁵⁷ Finally, the Court concluded the attorney's behavior was prejudicial to the administration of

⁵² Rule 1.15 *Safekeeping Property* states that:

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of [five years] after termination of the representation.

(b) A lawyer may deposit the lawyer's own money in a client account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.

(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute (*ibid.*, Rule 1.15).

⁵³ Ill. Sup. Ct. Rules, R. 752(a) //

http://www.state.il.us/court/SupremeCourt/Rules/Art_VII/artVII.htm#Rule752 (accessed July 2, 2013).

⁵⁴ *In Re Rinella*, 175 Ill. 2d 504, 677 N.E.2d 909 (1997).

⁵⁵ *Ibid.*: 514.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*: 515.

justice and was overreaching when he took undue advantage of the position of influence he held vis-à-vis the clients.⁵⁸

7. CORE VALUES

in response to the scholarly question of whether there is the “necessity” of regulating attorneys through two codes, both Model Rules and civility codes, the focus is misplaced. As demonstrated above, attorney discipline can happen with or without Canons, Codes, and Rules. And, as Venn Diagram, Part Two shows, ethics and discipline are more than Canons, Codes, and Rules. This is where the “other” codes come in. These “other” codes are efforts to refine core values of the profession—what were captured, to a great extent, in the Canons and Ethical Consideration of the 1970 ABA Model Code of Professional Responsibility⁵⁹ Thus, Venn Diagram, Part Three:

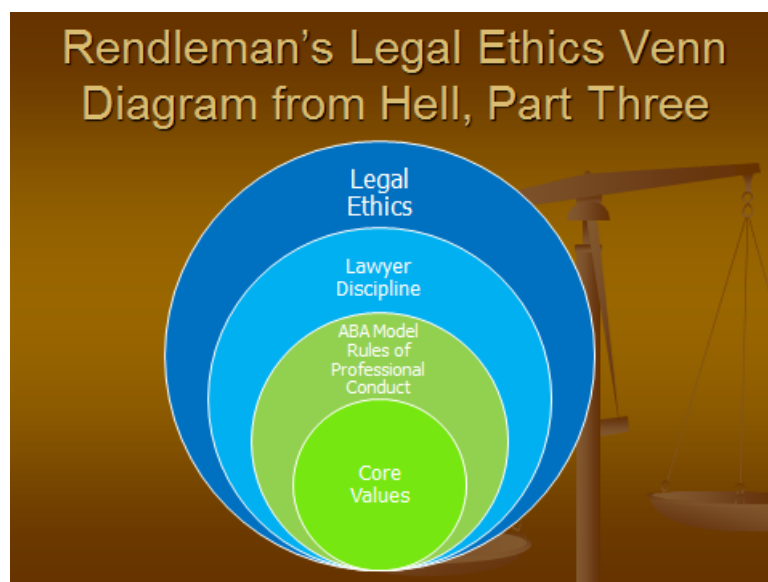


Fig. 6

In 1986, the ABA Commission on Professionalism issued a report “....In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism” that was a guide post for the professionalism movement.⁶⁰ The line between lawyer professionalism and lawyer civility is a matter of form and not substance.⁶¹ The

⁵⁸ *Ibid.*: 516.

⁵⁹ American Bar Association, *Compendium*, *supra* note 14, p. 223.

⁶⁰ American Bar Association Commission on Professionalism, “...In The Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism” // http://www.americanbar.org/content/dam/aba/migrated/cpr/professionalism/Stanley_Commission_Report.authcheckdam.pdf (accessed July 2, 2013).

⁶¹ American Bar Association, *Professionalism Codes* // http://www.americanbar.org/groups/professional_responsibility/committees_commissions/standingcommitteeonprofessionalism2/professionalism_codes.html (accessed July 2, 2013).

point is not to focus on lawyer discipline, but to improve the quality of the legal system experience. Presently, there are fourteen states that have state professionalism commissions.⁶²

Incivility and unprofessional behavior may or may not also be conduct that will subject a lawyer to professional discipline. A recent event in Chicago is illustrative. In April 2013, a trial court judge for Cook County disqualified each of the attorneys from continuing to represent their individual opposing clients in a civil case. The judge said the attorneys had both acted “wholly improperly” and were “impervious to reason and a show of force.” The judge had to order additional security for the courtroom during hearings where the two attorneys appeared and had taken the unprecedented step of having a deposition scheduled in the courtroom as it was a “neutral” location with court security present. After entry of his order discharging the two attorneys, the judge sent a copy of his order to the Illinois Attorney Registration and Disciplinary Commission.⁶³

This example hits the trifecta of lacking civility, being unprofessional and violating the Rules of Professional Conduct. But the purpose of all three and the purpose of having the different Canons, Codes and Rules is recognition of the principle illustrated by the Joseph Campbell story at the beginning of this paper—that the practice of law in the United States is not done by a homogeneous group who shares a common understanding, like the rugby players. Rather, American Lawyers are more like American football players—increasingly diverse (but not yet mirroring the diversity of our society)—where more “rules” allow better understanding of what is expected.

This is no better illustrated than by the eternal goal to find the core values of the profession. John Dean was quoted above saying that in 1972, legal ethics boiled down to “don’t lie, don’t cheat, don’t steal and don’t advertise.” This was the sense of “core values” at that time.

In 2000, the ABA House of Delegates passed a resolution in response to a Report that recommended expanded multidisciplinary practice. In defeating the expansion, the House identified certain core values:

It is in the public interest to preserve the core values of the legal profession, among which are:

a. the lawyer's duty of undivided loyalty to the client;

⁶² The fourteen states that have state professionalism commissions are Alabama, Florida, Georgia, Hawaii, Illinois, Maryland, New Jersey, New Mexico (American Bar Association, “New to Professionalism Commissions” // http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/guide_to_professionalism_commissions_august2011.authcheckdam.pdf (accessed July 2, 2013)).

⁶³ Kim Geiger, “Two Bickering Attorneys Thrown Off Case,” *Chicago Tribune* (April 24, 2013) // http://articles.chicagotribune.com/2013-04-24/news/ct-met-daley-center-case-20130425_1_former-lead-attorney-joel-brodsky-drew-peterson (accessed July 2, 2013).

- b. the lawyer's duty competently to exercise independent legal judgment for the benefit of the client;
- c. the lawyer's duty to hold client confidences inviolate;
- d. the lawyer's duty to avoid conflicts of interest with the client; and
- e. the lawyer's duty to help maintain a single profession of law with responsibilities as a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.
- f. The lawyer's duty to promote access to justice.⁶⁴

In 2008, then ABA President H. Thomas Wells stated: "We share four common core values: access to justice, independence, diversity, and the rule of law."⁶⁵

In the film of John Grisham's book "The Rainmaker", new, unemployed lawyer Rudy Baylor is shocked when his "paralegal", Deck Shifflet, who has failed the bar exam six times, engages in "ambulance chasing"—basic in-person solicitation of a client in a hospital. But in the colloquy another set of core values are revealed.

Shifflet—"In law school, they don't teach you what you need to know. It's all theories and lofty notions and big, fat ethics books."

Baylor—"What's wrong with ethics?"

Shifflet—"Nothing, I guess. You should fight for your client, refrain from stealing money, and try not to lie."

Baylor—"That was blatant ambulance chasing."

Shifflet—"Who cares? There's a lot of competition. What they don't teach in school can get you hurt."⁶⁶

CONCLUSION

Dorothy, the Scarecrow, the Tin Man and the Lion each represent core values. When the Lion received his medal for bravery, he was commended for his courage in the face of adversity. In lawyer terms, he displayed his zealous loyalty to his clients: Dorothy, the Scarecrow and the Tin Man. When the Tin Man received his watch in the shape of a heart, he received a symbol of love. In lawyer terms, he shows his fidelity and honesty to his clients. And the Scarecrow, who in demonstration of his "brain" received his diploma, received a symbol of his intelligence, but in lawyer terms, it was also his competence, ability to exercise independent judgment and diligence. Finally, Dorothy demonstrated her loyalty to Toto and her friends, but, in realizing that "there's no place like home," in lawyer

⁶⁴ American Bar Association, *MDP Recommendation* // http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdprecom10f.html (accessed July 2, 2013).

⁶⁵ American Bar Association, "ABA President: Lawyers' Core Values" // <http://www.abanow.org/2008/10/aba-president-lawyers-core-values/> (accessed July 2, 2013).

⁶⁶ "The Rainmaker Script- Dialogue Transcript," Movie Scripts // http://www.script-orama.com/movie_scripts/r/the-rainmaker-script-transcript.html (accessed June 27, 2013).

terms, she stood for commitment to the integrity and preservation of the legal system. Using this analogy, it is evident that Dorothy's protection of the ruby slippers is the preservation of these core values. It is better that we not discover what might happen if those slippers disappear.

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